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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JUDITH HASSOLDT et al., Plaintiffs and Appellants, v. CITY OF ROLLING HILLS, Defendant and Respondent.	B167218 (Los Angeles County Super. Ct. No. BC275012)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Reversed and remanded with directions.

Law Offices of Harold J. Light, Harold J. Light and Bruce A. Gilbert for Plaintiffs and Appellants.

Kutak Rock, Edwin J. Richards, Paul F. Donsbach and Jennifer L. Andrews for Defendant and Respondent.

This is an appeal from an order of dismissal entered after the trial court sustained demurrers to the plaintiffs' original and first amended complaints. We reverse the judgment and remand with directions to the trial court to permit the plaintiffs to amend one cause of action.

FACTS

A.

Judith and William Hassoldt own a large tract of land at 10 Pine Tree Lane, in the City of Rolling Hills. Ramon and Bernadette Cukingnan own another large tract adjacent to the Hassoldts' property. In the late 1980's, the Hassoldts decided to subdivide their property into three lots, the idea being that they would sell two and keep the other one. At about the same time, the Cukingnans also decided to subdivide their property.

When the Hassoldts submitted their subdivision plan, the City imposed a number of conditions, including a requirement that the Hassoldts upgrade and widen Pine Tree Lane so that the street would accommodate the anticipated increase in traffic resulting from the addition of two new lots. The Hassoldts agreed to the City's conditions, and the City issued a "Final Approval" of the Hassoldts' subdivision on October 7, 1999. When the Cukingnans thereafter submitted their subdivision plan, the City imposed a requirement that they extend and improve Pine Tree Lane beyond the work done by the Hassoldts. The Cukingnans agreed to the City's conditions and their Final Approval was issued in February or March 2002.

The Hassoldts began work in 1999. "During 2000 and into 2001," the Cukingnans obtained construction plans for their subdivision and began the

construction of the roadway extension required by the City. Throughout this time, according to the Hassoldts, the City and the Cukingnans conspired to harm the Hassoldts by depriving them of their constitutional rights by, among other things, "burden[ing] [the Hassoldts] with requirements, conditions, and costs which had no rational relationship to any legitimate governmental purposes, but which were intended [1] to unlawfully benefit the Cukingnans . . . at [the Hassoldts'] expense[,] and . . . [2] to allow the Cukingnans to proceed with their project without requiring compliance with law . . . and sound engineering practices[,] and [3] to have [the Hassoldts] bear a disproportionate (if not all) of the costs and expenses of improving Pine Tree Lane. . . ."

B.

In June 2002, the Hassoldts sued the City (and others who are not parties to this appeal) for damages and other relief, alleging a deprivation of their civil rights under color of law (42 U.S.C. § 1983), private nuisance, public nuisance, and breach of fiduciary duty. The theme of the complaint is that the City violated the Hassoldts' equal protection rights by treating them more onerously than the Cukingnans during the subdivision approval process. The City's demurrer was sustained without leave to amend the civil rights and public nuisance causes of action, but with leave to amend the other claims. The Hassoldts filed their first amended complaint in December, this time alleging a conspiracy between the City and the Cukingnans, private nuisance, and breach of fiduciary duty, again seeking injunctive relief, a writ of mandate, and damages.

In February 2003, the City's demurrer to the first amended complaint was sustained without leave to amend the substantive causes of action and the

claim for injunctive relief, and the Hassoldts then dismissed their cause of action for a writ of mandate. This appeal is from the order of dismissal thereafter entered.

DISCUSSION

I.

The trial court sustained the demurrer to the Hassoldts' civil rights' claim (42 U.S.C. § 1983) on the ground that, assuming the facts are sufficient to establish "unequal treatment" of similarly situated landowners (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562), the claim is barred by the governing one-year statute of limitations (Code Civ. Proc., § 340; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 323). The Hassoldts contend this was error and that, at a minimum, they should have been granted leave to amend. We agree.

A.

The Hassoldts allege that they "separated" their subdivision project from the Cukingnans' subdivision "in or around 1997," and thereafter sought the approval of their project. The final map for the Hassoldts' project was approved and recorded in October 1999.

"During the period [the Hassoldts] were required to take many actions in order to move [their subdivision] forward, the Cukingnans were far behind [the Hassoldts] in their plans for construction . . . . During this time, the Cukingnans did not do any appreciable grading or other project related work [on their project]. ***During the year 2000 and into 2001***, the Cukingnans began actually developing construction plans [for their project] and began construction of the Roadway Extension. ***Both before and after*** the Cukingnans began actually proceeding

forward with [their project], ***it did not appear*** that the Cukingnans were being required to exercise anything close to the care in connection with their subdivision that was being (and had been) required of [the Hassoldts]." (Emphasis added.)

There follows a list of the "apparent differential treatment" that occurred "[d]uring the year 2000 and into 2001," including allegations that the Cukingnans were able to obtain approvals more easily than the Hassoldts, and that the Cukingnans were allowed to change the set back requirements for their home without any formal process. The Hassoldts also allege that the City failed to address the issues the Hassoldts raised about problems with the Cukingnans' project -- while at the same time imposing more stringent burdens on the Hassoldts.

The Hassoldts then allege that, "[i]n or around February and March of 2002, the City . . . approved the Cukingnans' final map in the face of undeniable evidence of misconduct as relates to the Cukingnan Project."

The Hassoldts' complaint was filed on June 3, 2002.

B.

We first reject the City's threshold contention that the facts of this case cannot support a cause of action under 42 U.S.C. § 1983. In *Village of Willowbrook v. Olech, supra,* 528 U.S. 562, the plaintiff property owners alleged that a local agency had demanded a 33-foot water supply easement from each of them, but had required only a 15-foot easement from other property owners. In that context, the United States Supreme Court held: "Our cases have

recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Id.* at p. 564.) The Hassoldts' claim of disparate treatment vis-à-vis the Cukingnans falls squarely within this rule and defeats the City's claim that class-based discrimination must be alleged.

C.

The one-year period of limitations for a cause of action brought pursuant to 42 U.S.C. § 1983 accrues when the plaintiff knows or has reason to know of the injury that is the basis of his claim. (*Cabrera v. City of Huntington Park* (9th Cir. 1998) 159 F.3d 374, 379-380; *Golden Gate Hotel Ass'n v. San Francisco* (9th Cir. 1994) 18 F.3d 1482, 1486.) The injury alleged by the Hassoldts is that the City required them to do more (and thus to spend more) to obtain approval of their subdivision than was required of the Cukingnans. In their pleadings, the Hassoldts allege that the injurious acts occurred "[d]uring the year 2000 and into 2001" and "before" that time, and that, at that time, it "appeared" to the Hassoldts that they had been required to do more than the City required of the Cukingnans.

To avoid the effect of their admission that they knew *before* 2000, and certainly *during* the year 2000, that they had been injured, and that the City and the Cukingnans had (in the Hassoldts' view) caused that injury, the Hassoldts contend they should have been granted leave to amend this cause of action to plead an estoppel. We agree.

Had they been permitted to amend, the Hassoldts would have alleged additional facts that arguably support a claim that the City is estopped from asserting the statute of limitations, to wit: In September 1999, the City's lawyer wrote to the Hassoldts' lawyer, responding to the Hassoldts' concerns about "cost-sharing" with the Cukingnans and stating that "those matters [were] not before the City at [that] time." The City's lawyer continued: "The modifications presented and requested by the Cukingnans and the Hassoldts relate to the location of the roadway and the requirements to show that roadway on each final map. ***If the issue of cost still exists between the two property owners at the time the Cukingnans seek final map approval or modifications to their map that involve that issue, you and your client will have an opportunity to address them at that time.*** [¶] In the meantime, if you have any further questions regarding this matter, please do not hesitate to contact me."[1] (Emphasis added.)

Given these facts, leave to amend should have been granted. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions § 685, p. 872 [an "estoppel to set up the defense of the statute of limitations arises as a result of some conduct by the defendant, relied on by the plaintiff, that induces the belated filing of the action"].)

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[1] When the demurrer to the original complaint was heard, the trial court's tentative ruling rejected the City's statute of limitations argument and asked for further briefing on other issues. The Hassoldts briefed those other issues, as did the City, and a further hearing was held -- after which the trial court sustained the demurrer *without leave to amend* this cause of action on the ground that it was barred by limitations. On this appeal, the Hassoldts asked us to judicially notice the letter from the City's attorney to show that, given an opportunity to amend, they would have been able to overcome the City's demurrer. Although we earlier denied the unopposed request for judicial notice, we now vacate that ruling and grant the request. (Evid. Code, §§ 452, 459.)

II.

The Hassoldts contend their complaint pleads viable causes of action for both public and private nuisance. We disagree.

A.

"Anything which is injurious to health . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any . . . street, or highway, is a nuisance." (Civ. Code, § 3479.)

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) A private person may maintain an action for a public nuisance if it is specifically injurious to him, but not otherwise, and if the damage to him is different in kind, rather than in degree, from that shared by the general public. (Civ. Code, § 3493; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124.)

B.

The Hassoldts allege that the road improvements made by the Cukingnans and approved by the City are dangerous, that they affect "a considerable number of persons in that [they] expose[] those who drive on and live near the Roadway Extension and cul de sac to the risk of personal injury and property damage in that, among other things, (1) the inadequate width of the Roadway Extension may cause blockages along Pine Tree Lane which could result in fire and/or other emergency vehicles being unable to do what they

must; and (2) the placement and improper engineering of the Roadway Extension and cul de sac may pose danger to persons driving in the area of the Roadway Extension and cul de sac."

In their public nuisance cause of action, the Hassoldts allege that they have suffered injury different in kind from the public because the cul de sac is in part located on their property, and because they are immediately adjacent to the cul de sac and "will be the property most drastically and immediately affected by the problems with the adjacent roadway."

In their private nuisance cause of action, the Hassoldts allege that the cul de sac was constructed in part on their property, that it was not constructed according to sound engineering practices, that it is not wide enough and thus exposes them to injury because of the inability of emergency vehicles to use the roadway, and that the roadway is unsafe to all who use it.

C.

These facts are insufficient to plead a public nuisance cause of action because they show, at most, that the Hassoldts may suffer injury to a greater extent than others is the general area, but not that the injury they suffer would be different in kind. The dangers caused by the allegedly narrow roadway would affect anyone using the road, and the inability of emergency vehicles to gain easy access to the area would affect all of the homes and structures in the area. At best, there are differences in degree, not kind. (*Venuto v. Owens-Corning Fiberglas Corp., supra,* 22 Cal.App.3d at p. 124.)

These facts are similarly insufficient to plead a private nuisance cause of action because the most that can be said is that the Hassoldts have alleged a potential for future injury, not the existence of a condition that is now injurious to their health or that obstructs the free use of their property within the meaning of Civil Code section 3479. As a result, the acts alleged are not actionable. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1213; see also *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [to state a claim of private nuisance, the plaintiff must allege facts showing a substantial interference with the use and enjoyment of the premises].)[2]

DISPOSITION

The order is reversed and the cause is remanded to the trial court with directions to vacate its order sustaining without leave to amend the City's demurrer to the Hassoldts' civil rights cause of action (42 U.S.C. § 1983), to enter a new order sustaining that demurrer with leave to amend, and to conduct

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[2] The Hassoldts do not challenge the trial court's ruling on the breach of fiduciary duty cause of action.

such further proceedings as are appropriate; in all other respects, the judgment is affirmed. The parties are to pay their own costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

ORTEGA, J.